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No. 04-1140

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GERALD T. and JUANA M. MARTIN, on behalf of themselves and all others similarly situated,
Petitioners,

v.

FRANKLIN CAPITAL CORPORATION, a Utah Corporation, and CENTURY NATIONAL INSURANCE CORPORATION, a California Corporation,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR PETITIONERS

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QUESTION PRESENTED

What legal standard governs the decision whether to award fees and expenses under 28 U.S.C. § 1447(c) upon remanding a removed case to state court?

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the U.S. Court of Appeals, *Martin v. Franklin Capital*, 393 F.3d 1143 (10th Cir. 2004) ("*Martin II*"), is reproduced in the Appendix to the Petition ("Pet. App."), 1a-13a. The "memorandum opinion and order" of the U.S. District Court for the District of New Mexico is unreported and is reproduced in Pet. App. 14a-21a. A published opinion of the U.S. Court of Appeals in a relevant prior appeal, *Martin v. Franklin Capital*, 251 F.3d 1284 (10th Cir. 2001) ("*Martin I*"), is reproduced in the Joint Appendix ("JA"), 51-65.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals issued its decision on December 30, 2004. The Petition was filed on February 23, 2005, and granted on April 25, 2005.

STATUTE INVOLVED

28 U.S.C. § 1447(c) provides:

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

Prior to its amendment in 1988, Section 1447(c) had read:

> If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

STATEMENT OF THE CASE

This is a consumer class action arising under state law, filed in New Mexico state court. Plaintiffs Gerald T. and Juana M. Martiñ, who are Petitioners here, sued on behalf of themselves and others similarly situated, seeking "damages under state statutory and common law theories for alleged illegalities with respect to automobile financing and insurance contracts they had entered into with defendants." (Pet. App. 2a, *Martin II*, 393 F.3d at 1146). Defendant Century-National Insurance Company, with the consent and concurrence of defendant Franklin Capital Corporation, removed the case to U.S. District Court for the District of New Mexico, on the basis of diversity jurisdiction. (JA 34-37).

After some pretrial litigation, there was argument on Century-National's motion to dismiss. At that argument, counsel for the Martins raised the issue of lack of subject-matter jurisdiction. (JA 38). The District Court stated that it had spotted an issue as to whether the requisite amount in controversy had been shown, was "concerned" about it and was "wondering" about it, but had not made the effort to "ma[ke] any analysis" of it. (*Id.*). Indeed, the Court made clear that its failure to analyze the issue was no oversight: "If you [Martin's counsel] want that brought to the Court's attention, it's your obligation to do so." (*Id.*) *Compare Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) (reaffirming the long-standing principle that "subject-matter delineations must be policed by the courts on their own initiative even at the highest level."). The Court opined that a motion to remand might be untimely (*compare* 28 U.S.C. § 1447(c) (making clear that there is no time limit on a motion to remand based on lack of subject-matter jurisdiction)) but told the Martins' counsel that he could file such a motion if he wished. (JA 38). Counsel indicated that he would do so. (JA 40).

The Martins then moved to remand for lack of jurisdiction, because the amount in controversy did not meet the statutory minimum under 28 U.S.C. § 1332. (*See* Pet. App. 2a, *Martin II*, 393 F.3d at 1146). Opposing that motion, Defendants "argued variously [that] the amount in controversy was satisfied because the Martins' complaint sought punitive damages of more than $50,000 in the aggregate [as to all members of the putative class]; sought attorney's fees of

more than $50,000 in the aggregate [again as to all members of the putative class]; and sought monetary relief for the named plaintiffs for more than $50,000." (Pet. App. 2a-3a, 393 F.3d at 1146).

The District Court denied the motion to remand, and further denied the Martins' request to certify that order for immediate appeal. (JA 44-50). In the latter ruling, the District Court opined that the decision whether to remand (where, as here, the motion to remand is based on lack of subject-matter jurisdiction) is a "highly discretionary decision." (JA 45). *Compare* 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case *shall* be remanded.") (emphasis supplied). Plaintiffs asked the District Court to enter judgment against them so that they could seek review of the denial of their motion to remand. The District Court did so, and Plaintiffs appealed. (Pet. App. 3a, *Martin II*, 393 F.3d at 1146).

The U.S. Court of Appeals for the Tenth Circuit held, on that appeal, that the case was not removable because the amount-in-controversy requirement for diversity jurisdiction was not met. *Martin I*, 251 F.3d 1284 (10th Cir. 2001), JA 51-65. The Court of Appeals noted that the burden of proof was on the removing defendants to establish that the amount in controversy was sufficient. *Id.*, 251 F.3d at 1290, JA 57. The Court held first that defendants had failed to demonstrate that the claims of the Martins, considered individually, exceeded the statutory minimum for diversity jurisdiction. *Id.*, 251 F.3d at 1291, JA 59-60. The Court then turned to the class-related legal contentions on which defendants relied: the contention that either punitive damages, or attorneys' fees, could be aggregated among all members of the putative class so as to meet the amount-in-controversy requirement. As to the aggregation of punitive damages, at the time of the removal there had been some short-lived (and later-overruled)

out-of-Circuit authority that supported defendant's argument. Defendants had been trying to make new law to that effect in the Tenth Circuit, but the Court rejected their argument; it held that punitive damages could not be aggregated among class members. *Id.*, 251 F.3d at 1293, JA 60-62. The Court further rejected defendants' attempt to make new law allowing the aggregation of attorneys' fees so as to meet the amount-in-controversy requirement. *Id.*, 251 F.3d at 1293, JA 63.

The case returned to the District Court with instructions that it remand the case to state court. The District Court did so, and so more than three and a half years after the Martins had raised the jurisdictional issue, the case returned to the state court from which it had been improperly removed.

Plaintiffs then moved, under 28 U.S.C. § 1447(c), for an award of fees and expenses. The District Court denied that motion, explaining its reasoning in the "Memorandum Opinion and Order" that appears at Pet. App. 14a-21a. The District Court indicated that the removal, insofar as it had been based on the attempt to aggregate punitive damages, had not been "improper" at the time it was done, because there was out-of-Circuit authority that supported it and no Tenth Circuit authority rejecting it. (Pet. App. 17a-19a). As to the attempt to aggregate attorney's fees as a basis for the removal, the District Court indicated that the caselaw on which the Tenth Circuit relied in rejecting that theory had been "primarily" decided after the removal in this case. The District Court further stated that its analysis of the punitive damages issue was applicable to the attorney's fee issue as well. (Pet. App. 19a). The District Court recognized that the Tenth Circuit had held the removal to have been "improper" (Pet. App. 20a), but stated that this did not compel an award of fees. The District Court then denied the motion, stating "I conclude that in October 1996, Defendants had legitimate grounds for believing this case fell within this Court's

jurisdiction. I believe that Defendants had objectively reasonable grounds to believe the removal was legally proper. In reaching this conclusion, I have taken into account the complexity and uncertainty of the law in this area, as discussed above." (Pet. App. 20a).

Plaintiffs appealed the denial of fees and expenses. In the decision presently under review, which is contained in Pet. App. 1a-13a, the Tenth Circuit affirmed the decision as having been within the District Court's discretion. The Court stated, "Given our decision in *Martin I* that removal was improper in this case, the District Court had discretion to award attorney's fees to the Martins if it believed fees were appropriate. The district court determined defendants possessed objectively reasonable grounds to believe removal was proper and therefore declined to award fees to the Martins. We review that decision for abuse of discretion." *Martin II*, 393 F.3d at 1146, Pet. App. 4a. The Court of Appeals held, "While a close question, we agree with the district court that at the time defendants removed this action to federal court on the basis of aggregating punitive damages, they 'had objectively reasonable grounds to believe the removal was legally proper.'" *Id.*, 393 F.3d at 1148, Pet. App. 7a-8a. Having so concluded, the Court of Appeals found it unnecessary to "address defendants' remaining positions supporting removal." *Id.*, 393 F.3d at 1148 n.4, Pet. App. 8a. Like the District Court, the Court of Appeals based this conclusion on the fact that there had been, at the time of removal, some out-of-Circuit authority supporting the theory. *Id.*, 393 F.3d at 1148-50, Pet. App. 8a-11a. The Court of Appeals thus concluded that, based on the existence of "objectively reasonable grounds to believe the removal was legally proper," and given the "uncertain state of the law on aggregation of punitive damages when defendants removed this action," the District Court did not abuse its discretion in refusing to award fees under Section 1447(c). *Id.*, 393 F.3d at 1151, Pet. App. 13a.

SUMMARY OF THE ARGUMENT

The fee-shifting provision of Section 1447(c) says that a District Court "may" award fees and expenses upon remanding a case to state court. But the discretion embodied in "may" is limited by a governing legal standard. This Court has found governing legal standards in other fee-shifting statutes that (like this one) use "may" without any explicit standard. The Court has found the standard, for each type of case, through an examination of the law's "large objectives" and "equitable considerations." *Indep. Fed. of Flight Attendants v. Zipes*, 491 U.S. 754, 758-59 (1989).

Under that sort of analysis, the proper interpretation of "may" in Section 1447(c) is that a District Court should award fees to a plaintiff who has successfully sought remand, unless there are exceptional circumstances that would make such an award unjust. This would be very similar to the standard identified in *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968). Or, at least, the standard should consist of a presumption in favor of a fee award for a plaintiff who has successfully sought remand. As a corollary, the fact that the removing defendant had a plausible or reasonable argument in favor of removal is not a proper basis for denying an award of fees.

A *Piggie Park*-like standard will further the large objectives at stake in the law of removal and remand. It will reduce docket congestion in federal courts, which was a major concern underlying the Act that added the fee-shifting provision to Section 1447(c). It will assist in maintaining the proper relationship and comity between state and federal courts. It will reduce the wasted resources that come from litigation about questions of jurisdiction, and will promote the public interest in clarity in jurisdictional rules.

Fee-shifting standards different from the *Piggie Park* standard are appropriate in contexts where there is a public

interest in preserving litigants' incentive to creatively and zealously advocate even when their positions may be incorrect. But there is no public interest or even any legitimate private interest that is served by a removal of questionable validity. To the contrary, public and private interests suffer from such removals. And, indeed, the detrimental effects of an incorrect removal are most pronounced in those cases where the defendant had a reasonable argument in favor of the removal; the close cases cause the most disruption and waste of resources. So, a standard that exempted those cases from fee awards would give exactly the wrong incentives.

The standard that we propose is also most consistent with the statutory text, considered in light of the legal landscape at the time of its enactment. The deletion of some language from the prior text of Section 1447(c), the one-way nature of the fee-shifting provision, and other aspects of the text confirm that an award of fees should not be reserved for only the most patently incorrect removals. Furthermore, the standard should be a rule rather than a balancing of some set of factors. A rule-based standard is what Congress would have been anticipating at the time of enactment. A rule-based standard would have the best chance of influencing litigation behavior, and would reduce uncertainty.

Once it is realized that the existence of a reasonable (or even almost-good-enough) argument in favor of removal is not a proper basis for denying fees under Section 1447(c), a fee award is the only reasonable result in this case. Neither the lower courts, nor the defendants, have offered any valid reason to justify a denial of fees and expenses.

ARGUMENT

I. INTRODUCTION: IDENTIFICATION OF A FEE-SHIFTING STANDARD SETS THE INCENTIVES ON BOTH SIDES OF THE CLASS OF LITIGATION INVOLVED.

Fee-shifting statutes, this one included, create incentives. They deter one side from engaging in behavior that will give rise to a fee award, and they encourage the other side to challenge such behavior. Fee-shifting statutes commonly harness these incentives, in order to further the substantive goals of the law. Relatedly, fee-shifting statutes further the goal that the cost of certain types of behavior will fall where it equitably should. *See, e.g., Indep. Fed. of Flight Attendants v. Zipes*, 491 U.S. 754, 758-59 (1989). As Professor Pamela Karlan has put it,

> Fee shifting has become an increasingly prevalent feature of the American civil litigation system. Two standard justifications for fee shifting center on influencing attorney behavior. First, the idea of the "private attorney general" recognizes that certain important rights will be underenforced unless lawyers are given an economic incentive to litigate. Second, concern with attorney misbehavior has led to fee awards that compensate the innocent party for expenses he has incurred as a result of an opponent's culpable conduct. In addition to these behavior-centered reasons, another justification for fee shifting focuses on the rights of injured parties and the need for make-whole relief: if the cost of enforcing his rights is left to lie on an injured person, then an award equal to the damages he suffered will provide only a partial remedy.

Karlan, Symposium on Fee Shifting: Fee Shifting in Criminal Cases, 71 Chi-Kent L. Rev. 583, 589-90 (1995) (footnotes omitted).

The question here is what legal standard governs the decision whether to award fees and expenses under Section 1447(c). Identification of a legal standard sets the level of incentives on each side, in a manner designed to best promote the substantive goals of the law. If the goal is the simple one of deterring certain behavior by one side and encouraging the other side to challenge it, the standard that most neatly fits the bill is that the challenging party, if successful, *should* be awarded fees (except perhaps in exceptional circumstances). So, that standard has been adopted in cases such as *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968) (applying this standard to the decision whether to award fees to a successful plaintiff under Title II of the Civil Rights Act of 1964). If the goal is instead to deter a party from only some particularly bad sort of litigation behavior, but at the same time to protect that party's incentive to litigate arguably valid contentions aggressively and creatively without undue concern about added adverse financial consequences in the event of a loss, then a different legal standard is chosen. One standard that meets this set of goals is the allowance of a fee award only if the losing party's position was frivolous, unreasonable or without foundation. *See, e.g., Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978) (applying this standard to the decision whether to award fees against an unsuccessful plaintiff under Title VII). Finally, if the goal is something more complex, nuanced, and variable than either of those, then sometimes still another legal standard amounting to a balancing of factors may be appropriate. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994).

Sometimes Congress makes an explicit choice as to the standard. But often it does not, and it did not in Section

1447(c). In these instances, the question of when fees should be awarded becomes one for judicial resolution.[1]

II. WHEN CONGRESS ENACTED THE FEE-SHIFTING PROVISION OF SECTION 1447(C), IT WAS DEEPLY CONCERNED WITH DOCKET CONGESTION IN THE FEDERAL COURTS.

When enacting the Judicial Improvements and Access to Justice Act of 1988, P.L. 100-702, the Congress was, to its credit, intensely concerned with the burdens on the federal judiciary and the overcrowding of dockets in federal courts. *See* H.R. REP. 100-889, 1988 U.S.C.C.A.N. 5982, 5983 (referring to Congress's concern, reaching back more than a decade, that the federal courts were "overloaded with cases," and noting that despite intervening actions "much remains to be done"); *id.* at 5984 (referring to Congress's concern with "pressures placed on judges who must cope with the torrent of litigation," and noting that "in order to maintain pace with societal and technological changes that are translated into constant and growing judicial workloads, more needs to be done."). Other references to the judicial workload and burdens appear throughout that House Report. *See also Tank v. Chorister*, 160 F.3d 597, 599 (10th Cir. 1998) ("The purpose of the Act was to reduce substantially the diversity jurisdiction of the federal courts."). The Act therefore included various provisions that would alleviate docket congestion in federal courts. These included a five-fold increase in the amount-in-controversy requirement for diversity cases (Section 201), a new restriction on the right of removal (Section 1016(b)(2)(B)), a program to foster arbitration (Section 901 *et seq.*), and the creation of a Federal

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[1] This Brief will often refer to "fees," rather than "fees and expenses." Unless otherwise apparent from the context, this is simply for the sake of brevity. It never constitutes abandonment of the request for expenses.

Courts Study Committee to delve further into these and related issues (Section 101 *et seq.*).

The Act also revised the procedure for removing cases from state court. Removal had until then been accomplished by a "petition," but Section 1016 of the Act substituted the mechanism of "notice." This aspect of the Act, like others, reflected the Congressional concern with overcrowded federal-court dockets: Section 1016(b) of the Act, codified at 28 U.S.C. § 1446, specifically pointed out that a notice of removal (like all other pleadings and papers) would be subject to Fed. R. Civ. P. 11. In this way, Congress underscored—perhaps unnecessarily, as Rule 11 would have applied even without that reference, but nonetheless as an unmistakable sign of legislative concern about inappropriate removals—that frivolous removals could lead to awards of attorneys' fees or other sanctions.

But even this notable and rare statutory reference to Rule 11 was not enough to reflect the full extent of Congress's concern with wrongful removals and with remedies for them. Beyond that, Congress added something that had not previously been part of the removal statutes: a provision allowing District Courts to award attorney fees when remanding a case. This was Section 1016(c)(1) of the Act, amending 28 U.S.C. § 1447(c).

III. THERE IS A STANDARD AS TO WHEN FEES SHOULD BE AWARDED, AND IT IS TO BE FOUND THROUGH EXAMINATION OF THE LAW'S "LARGE OBJECTIVES" AND OF THE RELEVANT "EQUITABLE CONSIDERATIONS."

The first step towards answering the question presented is to recognize that there is an answer. Though Section 1447(c) says that a District Court "may" award fees, that does not mean that each District Judge may do whatever he or she pleases. Instead "may" incorporates a legal standard that is to

be identified by this Court. As this Court said in interpreting "may" in another fee-shifting statute, "[a]lthough the text of the provision does not specify any limits upon the district courts' discretion to allow or disallow fees, in a system of laws discretion is rarely without limits." *Indep. Fed. of Flight Attendants v. Zipes*, 491 U.S. 754, 758 (1989).

Those limits are to be found "in the large objectives of the relevant Act, which embrace certain equitable considerations." *Id.*, 491 U.S. at 758-59 (citations and internal quotation marks omitted). Those things guide the Court in interpreting the statutory text. Using this method, this Court has often arrived at categorical rules, under which in some contexts "may" means "should, except in exceptional circumstances," and in other contexts means "must not, except in cases of litigation conduct that was frivolous, unreasonable or without foundation." *See Piggie Park*, 390 U.S. at 402 (successful plaintiff under Title II of Civil Rights Act of 1964 should ordinarily receive an award unless special circumstances would render such an award unjust); *Northcross v. Bd. of Ed. of Memphis City Schools*, 412 U.S. 427 (1973) (applying *Piggie Park* standard to decision whether to award fees to a successful plaintiff in litigation under Section 718 of the Emergency School Aid Act of 1972); *Christiansburg Garment*, 434 U.S. at 421 (fees can be awarded against unsuccessful plaintiff in Title VII case only if the case was "frivolous, unreasonable or without foundation"); *id.* at 417 (holding that, on the other hand, the *Piggie Park* standard applies to awards to successful plaintiffs under Title VII); *Zipes*, *supra* (applying the stringent *Christiansburg Garment* standard to decision whether to award fees to a plaintiff against an unsuccessful intervenor in Title VII case).

Congress, in turn, has come to rely on this Court's willingness and ability to perform that sort of analysis. When enacting the current version of Section 1447(c) in 1988, Congress could trust that the word "may" would receive the

same sort of analysis that the word had received in prior cases. Congress was on notice that if it used similar language from one fee-shifting statute to the next, this Court would interpret that language similarly. *Northcross*, 412 U.S. at 428; *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983) (holding that the phrase "prevailing party" would be taken to mean the same thing in every fee-shifting statute where it appeared); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 691-92 (1983) (same, as to the word "appropriate" as used in several statutes). Knowing that, in Section 1447(c) Congress used the same word "may" that this Court had interpreted categorically in other fee-shifting statutes. There is no reason to believe that Congress, when enacting P.L. 100-702 and knowing of the pre-1988 decisions cited above, intended in this instance (unlike all others) that the word "may" would be interpreted as a standardless grant of discretion to the District Courts. There is no reason to believe that the Congress expected that as to this statute alone, this Court would interpret "may" as meaning that each District Court could choose at its pleasure among the *Piggie Park* standard, the *Christiansburg Garment* standard, or some other standard.

So, the Tenth Circuit (whose decision is under review) has erred by adopting a view of Section 1447(c) that incorporates no true standard at all. That Circuit allows District Courts to use a standard that is the same as or at least quite close to the *Christiansburg Garment* rule, as the District Court did here. When a District Court chooses that standard, the Circuit will affirm (as it did here) after concluding *only* that the defendant's removal, though legally incorrect, was still not without a reasonable basis. *Martin v. Franklin Capital*, 393 F.3d at 1147 (Pet. App. 6a-7a); *id.* at 1151 (Pet. App. 13a). Nothing more than that is required, and so there is nothing to stop a District Judge from declining to award fees whenever the removal, though incorrect, had some reasonable argument in support. But the same Circuit also allows a District Court to use a different standard, even the *Piggie Park* standard.

This is demonstrated by the fact that, when reviewing a District Court's decision to award fees, the Circuit inquires *only* whether the District Court was correct in holding the case to be non-removable. Again, nothing more than that is required, and so there is nothing to stop a District Judge from routinely awarding fees every time he or she remands a case. *Topeka Housing Authority v. Johnson*, 404 F.3d 1245 (10th Cir. 2005). This amounts to no standard at all; and a no-standard interpretation of the word "may" conflicts with *Zipes*.

IV. THE CORRECT STANDARD IS THE *PIGGIE PARK* RULE, OR A VERY STRONG PRESUMPTION IN FAVOR OF A FEE AWARD FOR A PLAINTIFF WHO SUCCESSFULLY SEEKS REMAND.

Having shown that there is a correct standard, what remains is to show that the District Court used the wrong one (and so the Court of Appeals erred in affirming). The District Court's denial of fees was based on its conclusion that "Defendants had objectively reasonable grounds to believe the removal was legally proper." (Pet. App. 20a). The Circuit Court's affirmance was based on that same characterization, and on the holding that the District Court therefore acted within its discretion in denying fees. (Pet. App. 13a). It should go without saying that, in general, lawyers in civil litigation simply ought not be taking positions that lack an objectively reasonable basis; and so if that is the standard for fee awards, then fees are to be awarded only when the removal was extremely inappropriate indeed. However, the District Court was not alone in adopting this standard. The Fifth Circuit, for example, utilizes the same standard: "Fees should only be awarded if the removing defendant lacked 'objectively reasonable grounds to believe the removal was legally proper.'" *Hornbuckle v. State Farm Lloyds*, 385 F.3d 538, 541 (5th Cir. 2004).

That standard is quite similar to the *Christiansburg Garment* standard, which bars a fee award against an unsuccessful civil rights plaintiff in all but the very bad cases. The *Christiansburg Garment* standard is "frivolous, unreasonable, or without foundation." 434 U.S. at 421. "Frivolous" and "without foundation" are, if anything, even worse than "unreasonable" in day-to-day legal parlance. To the extent that the three adjectives or phrases are not synonyms, then, "unreasonable" is ultimately the dividing line as to when fees can be awarded under *Christiansburg Garment*; and unreasonableness is also the touchstone in the Fifth Circuit's test, and in the test that the District Court used here. If there is any difference between these tests in practical application, the difference is quite narrow and hard to pin down.

But that is not the proper standard under Section 1447(c). The proper standard is the *Piggie Park* rule, or a very strong presumption in favor of a fee award. A plaintiff that successfully seeks remand should receive an award of fees and expenses unless special circumstances would render such an award unjust. At the least, as the Seventh Circuit has held, there is a presumption in favor of an award when a case is remanded. *See, e.g., Hart v. Wal-Mart Stores*, 360 F.3d 674, 678 (7th Cir. 2004). As a corollary, it should be made explicit that the existence of a reasonable but losing argument in favor of the removal (or even a losing argument that was better than merely "reasonable") is *not* a special circumstance that would justify an exception to the *Piggie Park* rule. Likewise, if the Seventh Circuit's "presumption" formulation is adopted, it should be made clear that the existence of such an argument is *not* a countervailing factor that would overcome the presumption. These clarifications are necessary because without them we would all simply find ourselves with the same problems once again: either the standard would differ from one courtroom to the next, or the *Christiansburg Garment* standard would prevail in all but name.

A. The relevant "large objectives" and "equitable considerations" call out for the *Piggie Park* rule.

The search for the proper standard begins with the roadmap in *Zipes*: the standard is to be found through examination of "the large objectives of the relevant Act, which embrace certain equitable considerations." *Zipes*, 491 U.S. at 759 (citations and internal quotation marks omitted). The "relevant Act" in this sense, could be understood as meaning either P.L. 100-702, or the greater body of law regarding removal and remand, or (best yet) both of those. The Act in which this fee-shifting provision was contained is relevant because it sheds light on the concerns that were immediate to the Congress at the time; and the greater body of law on the topic is also relevant, because it embodies the relevant public and private interests that are at stake. So, we turn to identifying the large objectives and equitable considerations.

When this Court has read "may" to mean something other than the *Piggie Park* rule, it has been in litigation contexts where there was some reason why the class of litigants subject to a fee award should be encouraged to litigate even though they might lose. This Court has read "may" to mean the *Christiansburg Garment* standard, or another standard other than a strong presumption in favor of fees for the winning party, in contexts where there was an affirmative public benefit derived from a party's willingness to zealously litigate the tough questions and hard cases. The bar for a fee award against such a party was set higher than merely losing the case, at least in part so as not to deter such a party from litigating aggressively but reasonably on a debatable point. This sort of reasoning appears repeatedly in this Court's caselaw. *Christiansburg Garment*, 434 U.S. at 422 ("To take the further step of assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would

undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII. Hence, a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so."); *Zipes*, 491 U.S. at 763-65 (applying *Christiansburg Garment* standard to bar fee awards against intervenors in Title VII cases, in part because their participation in cases was "particularly welcome" and because a lower standard for fee awards would cause them to bring separate litigation to collaterally attack a decree instead of intervening, which would be to the detriment of all persons involved); *Fogerty*, 510 U.S. at 526-27 (1994) (discussing the fact that the public derives a benefit from successful *defense* of copyright litigation, as well as from the successful *pursuit* of such litigation).

There is no interest of that sort in the removal and remand context. There is no public benefit that comes from a defendant's willingness to aggressively remove cases when the propriety of removal is questionable or worse. To the contrary, such litigation behavior is detrimental to the public interest. That is the first reason why a standard like *Piggie Park*, and not a standard like *Christiansburg Garment*, ought to apply here.

The "large objectives" and "equitable considerations" at stake in the context of removal and remand include three related goals. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) ("Subject-matter limitations on federal jurisdiction serve institutional interests."). First is the preservation and pursuit of *comity* between state courts and federal courts, as well as the proper balance between federal and state control. An incorrect removal of a case that should have been left in state court is detrimental to this objective. *Shamrock Oil & Gas Co. v. Sheets*, 313 U.S. 100, 109 (1941) ("Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined."), *citing Healy v. Ratta*, 292 U.S. 263, 270 (1934); *University of South Alabama v. American Tobacco Company*, 168 F.3d 405, 411 (11th Cir. 1999) ("[R]emoval jurisdiction raises significant federalism concerns ... [I]f a federal court reaches the merits of a pending motion in a removed case where subject matter jurisdiction may be lacking it deprives a state court of its right under the Constitution to resolve controversies in its own courts.").

Second is the avoidance of further burdens on the already-too-burdened federal judiciary. As we have pointed out above, this was a major concern for Congress when enacting P.L. 100-702, which included this fee-shifting provision. An incorrect removal of a case does harm in this regard as well. And, notably, the burden on the federal courts is *greater* from a removal that presents a close question than from one that is not even supported by a reasonable argument. Thus a *Christiansburg Garment*-like rule is a perverse incentive in the removal context: it fails to deter precisely those actions that cause the most harm. A removal that is not even supported by a reasonable argument can be dealt with swiftly, often by the District Court *sua sponte*; and the removals that are completely unreasonable can, in any event, be caught and disposed of quickly enough to avoid significant litigation on the merits in federal court prior to a remand. An incorrect removal that presents a close question, by contrast, makes more work for the federal bench: more work in spotting the jurisdictional issue if the plaintiff does not immediately do so, more work in deciding whether the removal was appropriate, and (if the reasonably-debatable removal is incorrectly upheld by a District Judge, as it was in this case) there can be the disastrous consequence that the District Court sees the case through to final judgment, only to have that judgment voided on appeal and the case remanded to state court. *See, e.g., Hart v. Terminex International*, 336 F.3d 541 (7th Cir. 2003)

(holding, after eight years of litigation in federal court, that the case had been wrongly removed and that all those years of litigation were a waste); *Nichols v. Harbor Venture, Inc.*, 284 F.3d 857, 863 (8th Cir. 2002) ("Notwithstanding the regrettable waste of judicial and private resources in which our decision today results, we must reverse the District Court's order denying Nichols's motion to remand to state court.").

Third, and related to these, is the detriment to the public that comes in general from needless expenditure of resources on unmeritorious satellite litigation over procedural points. Once again, in this regard the close cases are even worse than the unreasonable removals. When a removing party's learned counsel attempts to find and exploit complexities and uncertainties in the removal laws in order to create a creditable argument in favor of a novel expansion of removal jurisdiction, the public interest in clarity of the jurisdiction laws is impaired. "Jurisdiction should be as self-regulated as breathing; . . . litigation over whether the case is in the right court is essentially a waste of time and resources." Currie, The Federal Courts and the American Law Institute, Part I, 36 U. Chi. L. Rev. 1 (1968), *quoted in Navarro Savings Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980). Closely related to this public interest is the private interest of the plaintiff, whose lawsuit has been delayed through unnecessary procedural maneuvering by the defendant, often requiring significant attorney time and expense to the plaintiff. This private interest of the plaintiff is relevant, along with the public interests, because the roadmap takes account of the "equitable considerations" involved. *Zipes*, 491 U.S. at 759. And the waste of resources is again magnified even further when there is a truly close question of removal law, such that a District Court denies a motion to remand and continues to a final judgment, only to have that judgment vacated when the Court of Appeals resolves the close question the other way.

The substantive law of removal jurisprudence has long developed in a direction that serves these "large objectives" and "equitable considerations." The main relevant principle of substantive law is that removal statutes are strictly construed, and all doubts about the existence of removal jurisdiction are to be resolved in favor of remand. *See, e.g., Shamrock Oil*, 313 U.S. at 109; *Dixon v. Coburg Dairy*, 369 F.3d 811, 816 (4th Cir. 2004) (en banc) ("We are obliged to construe removal jurisdiction strictly because of the 'significant federalism concerns' implicated. Therefore, 'if federal jurisdiction is doubtful, a remand [to state court] is necessary.'") (bracketed material in original, citations omitted); 14C C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 3739 (noting that doubts about removal should be resolved in favor of remand, and stating that this "rule rests on the inexpediency, if not unfairness, of denying the motion for remand and thereby exposing the plaintiff to the possibility of winning a final judgment in federal court, only to have it determined on appeal that the court lacked subject matter jurisdiction, which would require the proceeding to be repeated in state court.").[2] This rule resolving the hard questions against the removing defendant is complemented by the rule forbidding appellate review of a remand order, at least when the remand is based on the

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[2] For a sample of other cases agreeing that doubts are to be resolved in favor of remand, see *Gilman v. BHC Securities, Inc.*, 104 F.3d 1418, 1428 (2nd Cir. 1997); *Samuel-Bassett v. Kia Motors America, Inc.*, 357 F.3d 392, 403 (3rd Cir. 2004); *Acuna v. Brown & Root, Inc.*, 200 F.3d 335, 339 (5th Cir.), *cert. denied*, 530 U.S. 1229 (2000); *Coyne v. American Tobacco Company*, 183 F.3d 488, 493 (6th Cir. 1999); *Roe v. O'Donohue*, 38 F.3d 298, 304 (7th Cir. 1994); *Transit Casualty Co. v. Certain Underwriters*, 119 F.3d 619, 625 (8th Cir. 1997), *cert. denied* 522 U.S. 1075 (1998); *Duncan v. Stuetzel*, 76 F.3d 1480, 1485 (9th Cir. 1996); *Pritchett v. Office Depot, Inc.*, 404 F.3d 1232 (10th Cir. 2005); *University of South Alabama v. American Tobacco Company*, 168 F.3d 405, 411 (11th Cir. 1999).

District Court's conclusion about the scope of removal jurisdiction. *See* 28 U.S.C. § 1447(d). Novel or highly debatable efforts to expand federal jurisdiction through removal are thus doubly discouraged: District Courts ought to reject them, and the appellate courts will not interfere if the District Courts do so.

In other words, under the substantive law, defendants *should not* remove cases based on novel contentions in an attempt to expand federal jurisdiction beyond its traditional limits. An argument in favor of removal should not be made merely because it is reasonably debatable; a case should not be removed if it is doubtful whether it is removable, because any such doubts are to be resolved in favor of remand. A defendant that premises removal on a legal proposition of questionable validity, in order to create new law, has ignored this fundamental rule of removal law. There is, therefore, no reason to protect such a defendant; to say that the defendant's argument was not unreasonable, is in this context to damn it with faint praise. A defendant that removes a case incorrectly has actually done something blameworthy, something that is to the detriment of the state and federal judiciary and the public as a whole as well as to the plaintiff. A plaintiff who responds successfully to those efforts has benefited the public and the judicial system, but at the cost of attorney time and effort. It is equitable, as well as being in furtherance of the large objectives of the law, that the cost should fall on the party that was in the wrong.

That is the first reason why the *Piggie Park* rule is the best interpretation of Section 1447(c): the standard for fee awards should be interpreted in a way that works with, rather than against, the concerns embodied in the substantive law. A *Piggie Park* rule will yield less federal docket congestion, less interference with state courts, and fewer wasted public and private resources, in two related ways. First, it will deter incorrect removals in many cases (as defendants, contemplating a questionable removal, will conclude that the cost of a likely fee award outweighs the chance of a benefit). And second, it will cause more plaintiffs to challenge legally-incorrect removals—and to challenge them well—thus removing even more cases from the federal docket without the necessity of lengthy discovery, summary judgment proceedings, and trials.

For these reasons, it is implausible to suggest that the Congressional desire, in enacting the fee-shifting provision in § 1447(c), was to *protect* all but the worst removing defendants. And from what we have said above, it should be clear not only that the District Court was wrong in applying a standard that is practically equivalent to *Christiansburg Garment*. Beyond that, the governing standard should not even protect those defendants who had an argument that merits a description more favorable than "not unreasonable." The public interest is not served by interesting-but-ultimately-wrong removals, any more than it is served by plainly incorrect ones. Both sorts of incorrect removals are purely a drain on public and private resources, and as we have shown above the closest questions can often create the greatest drain. Both sorts of incorrect removals, both the interesting and the patently wrong, are to be avoided under the substantive law. There is no reason to believe that the Congress meant to foster and protect *any* incorrect removals; there is every reason to believe that the Congress meant to deter them and to urge plaintiffs to challenge them. There is no reason in the law's "large objectives" and "equitable considerations" to adopt any rule other than *Piggie Park*.

B. The text of the statute, interpreted in light of the relevant legal landscape, confirms that the *Piggie Park* rule applies.

The foregoing analysis of the "large objectives" and "equitable considerations" (*Zipes*, 491 U.S. at 759) is confirmed by analysis of the text and legal context of Section 1447(c). That

text, as understood in light of the legal landscape at the time of enactment, lends itself most readily to a *Piggie Park* interpretation of the crucial word "may."

First, the 1988 deletion of the word "improvidently" in Section 1447(c) is a textual clue supporting our view. Previously, a District Court could not award even "just costs" (much less fees, for which there was no provision) unless the case had been "removed improvidently." It is hard to say precisely what level of culpability beyond merely being incorrect was denoted by the word "improvidently," and so what hurdle (if any) that word put in the way of the routine awarding of costs. But this much at least is clear: Congress intentionally deleted that word. The only inferable reason is that Congress meant to eliminate any possible suggestion that something more than simple incorrectness on the part of the removing party was required to justify a remand with award of costs. At the same time, Congress added the fee-shifting provision, with no textual or extra-textual suggestion that fees were to be reserved for a narrower set of cases than were costs. Thus the text of the statute as compared with the prior version shows Congress rejecting any requirement of culpability beyond mere incorrectness. It would therefore be wrong for the courts to re-insert the "improvidently" standard, or any other standard requiring a particular degree of wrongness, as a requirement for fee awards.

Second, the text of the statute is notable as compared to many fee-shifting statutes, in that a fee award is available *only* if the case is remanded. There is no provision for an award of fees to a defendant who successfully fends off a motion to remand, even if the grounds for that motion were quite flimsy. One can therefore infer that Congress, in enacting the fee-shifting provision, had no solicitude for removing defendants at all. The fee-shifting provision was not written to help defendants even when their removals were correct, much less when their removals were incorrect.

Congress was not seeking to deter plaintiffs from challenging removals, even when their challenges lacked merit. The fee-shifting provision goes only in one direction, towards a reduction in the number of removed cases on the federal dockets. That goal is best served by interpreting "may" in the *Piggie Park* way.

Furthermore, the one-way nature of the fee-shifting text makes a *Christiansburg Garment* interpretation (or anything close to that) all the more inappropriate, because such an interpretation would make the fee-shifting statute trivial. We should not infer that Congress does things that are trivial. If a defendant can escape fee liability by showing merely that it had a reasonable argument, then the statute provides only negligible deterrence (if any at all) of inappropriate removals and negligible compensation (if any at all) to plaintiffs, and thus fails to achieve any purpose to any material degree. *Cf. Piggie Park*, 390 U.S. at 402 n.4 (statute cannot be read as allowing fees only in case of bad faith, as courts already had the authority to issue fee awards in such cases). After all, when this statutory language was adopted, Fed. R. Civ. P. 11 already existed, and the applicability of Rule 11 to removals was explicitly underscored in Section 1016(b) of P.L. 100-702, amending 28 U.S.C. § 1446. At the time, Rule 11 explicitly authorized an award of fees as a sanction for violations of the Rule. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 391-92 (1990) (quoting then-current text of Rule 11). So there was no need to enact a new statute to deter removals that violated Rule 11 standards; and it is hard to imagine the existence of any defendant who could believe that its argument in favor of removal would pass Rule 11 muster, yet would believe that its argument was unreasonable (and so would forego the opportunity to try removal, for fear of a fee award under § 1447(c)). It is virtually impossible to imagine that the Congress enacted § 1447(c)'s fee-shifting language solely for the narrow purpose of deterring that tiny hypothetical set of would-be removers who thought their

potential arguments fell in that thin range between frivolous and unreasonable. If the statute means that fees can be denied on the grounds that the defendant had a reasonable argument at its disposal, the fee-shifting aspect of the statute serves practically no purpose at all.[3]

For these reasons, the text of the statute supports our view that the existence of a reasonable argument in favor of removal (or even an incorrect argument that was better than merely reasonable) is not a basis for denying a fee award under Section 1447(c).

C. Snippets of "legislative history" do not call for a different rule.

Respondents may contend that some bits of legislative history call for a standard the same as, or close to, the standard that prevailed under pre-1988 law. This contention would be based on some sentences in the legislative history indicating that the purpose of the revised Section 1447(c) was to "replace" the requirement of filing a bond upon removal that had existed under the prior version of Section 1446. *See* 134 Cong. Rec. S 16284, 16308; H.R. Rep. 100-889, 1988 U.S.C.C.A.N. 5982, 6033.

However one feels in general about resort to reports and floor statements as guides to interpreting legislation, these uses of the word "replace" cannot do the work that Respondents want them to. The reason in a nutshell is that the word "replace" can be used either in reference to the substitution of a thing with something else that is its equivalent, or (perhaps even more commonly) in reference to the substitution of a thing with something else precisely

[3] By contrast, interpretation of Title VII's fee-shifting provision as utilizing the *Christiansburg Garment* standard in certain areas did not make that provision trivial. That is because, unlike Section 1447(c), the fee-shifting provision of Title VII applies in a variety of situations, some of which are not governed by the *Christiansburg Garment* standard.

because the replacement is *better*.[4] Respondents want "replace" here to mean the former, but there is no reason to have confidence that every member of Congress, or the majority of both Houses, or some Members or even some staffer meant that.

In fact, if the case comes down to any degree to what the Congress meant by the non-statutory word "replace" in the legislative history, the better interpretation is that the intent was to "replace" the former bond requirement with something that was *more effective* in deterring incorrect removals and in compensating plaintiffs for the work that such removals cause. If Congress had meant to leave the standard for fee awards the same as it had been—to "replace" the old scheme with something that was no different in practice—Congress would have included no reference to attorney fees at all. The prior statute had none, and so including none in the new version would have left the standard for fee awards unchanged. Instead the Congress added a specific authorization to award fees. This was truly a change. "Before the 1988 amendments to the removal statutes, an award of 'just costs' was allowed if the suit was 'removed improvidently and without jurisdiction.' . . . Under the American Rule that attorney's fees are not recoverable absent a statutory or contractual provision for them, fees were not allowed under the former statute unless counsel proceeded in bad faith or some other exception to the American rule applied." *Miranti v. Lee*, 3 F.3d 925, 927 n.2 (5th Cir. 1993).[5] The addition of

[4] *See, e.g.*, President Ronald Reagan, "Address Before the 38th Session of the United Nations General Assembly," <http://www.reagan.utexas.edu/resource/speeches/1983/92683a.htm> (last visited May 2, 2005) ("The founders [of the United Nations] sought to replace a world at war with a world of civilized order.").

[5] Pre-1988 cases to this effect include *ITT Industrial Credit Co. v. Durango Crushers, Inc.*, 832 F.2d 307, 308 (4th Cir. 1987); *Peltier v. Peltier*, 548 F.2d 1083 (1st Cir. 1977); *Muirhead v. Bonar*, 556 F.2d 735 (5th Cir. 1977).

express fee-shifting language changed the standard: it made fee awards available more broadly by "remov[ing] the need to show bad faith to receive attorney fees." *Tenner v. Zurek*, 168 F.3d 328, 330 (7th Cir. 1999); *see also id.* at 329-30 (collecting cases to similar effect); *Balcorta v. Twentieth-Century Fox*, 208 F.3d 1102, 1106 n.6 (9th Cir. 2000).

So, the very adoption of fee-shifting language is itself proof that the Congress intended to change the standard and increase the availability of fees, consistent with the Act's wider purpose of reducing docket congestion in federal courts. As to the question of how much the standard was changed, the occasional use of the word "replace" in the legislative history does not answer that. Indeed, nothing in any report or floor statement speaks to the question with any specificity or clarity. The degree of the change is to be found, instead, through the analysis of the statute's text, "large objectives," and "equitable considerations" that has been completed above.

D. The standard should not be a balancing of some set of factors.

As seen above, when identifying an applicable standard for fee-shifting statutes, this Court has most often arrived at a *rule*: the *Piggie Park* rule or the *Christiansburg Garment* one. But in interpreting the Copyright Act's fee-shifting provision in *Fogerty*, this Court arrived at a different reading of "may": a non-rule standard calling for consideration of a non-exclusive set of factors. *Fogerty*, 510 U.S. at 534 n. 19. A *Fogerty*-like non-rule standard would be inappropriate for Section 1447(c) for the following reasons.

First, a reasonably observant legislator reading or writing Section 1016(c) of P.L. 100-702 in 1988 would have anticipated that this Court would read it as incorporating a rule, and in particular the *Piggie Park* rule. By 1988, a reasonable legislator who was aware of this Court's decisions

(as Congress is presumed to be, *Jackson v. Birmingham Board of Education*, ___ U.S. ___, ___, 125 S.Ct. 1497, 1506 (2005)), would have known the following. This Court had, for twenty years, been reading the word "may" in fee-shifting statutes as incorporating rules: more often the *Piggie Park* rule, but in one instance the *Christiansburg Garment* rule. The *Christiansburg Garment* rule had been applied only where the Congress was thought to have affirmatively wanted to foster aggressive litigation by the party against whom fees were sought. Furthermore, this Court had made it clear that it would read the same words in the same way, from one fee-shifting statute to the next. *Northcross*, 412 U.S. at 428; *Hensley*, 461 U.S. at 433 n.7. And, in 1988, *Fogerty* was not yet on the books; so there was no reason to think that this Court might read "may" as incorporating no actual rule. Given all these things, Congress would have used a word other than "may" if it had intended something other than *Piggie Park* or *Christiansburg Garment*. A reasonable legislator at that time had every reason to expect that this Court would view the case as a choice between those two standards.

Second, a rule-based standard is more predictable in application, and therefore has much more chance of impacting litigation behavior. As has been seen above, among the "large objectives" at stake here, *Zipes*, 491 U.S. at 759, is the reduction of docket congestion, through deterrence of inappropriate removals and encouragement of challenges to such removals. Related to this are other "large objectives": fostering comity between state courts and federal courts, and improving litigation efficiency (which is undermined by unnecessary satellite litigation over an incorrect removal and remand). A *Fogerty*-like standard, based on weighing of various factors and interests, would have much less tendency to achieve those goals than would an appropriate rule. Not only is the application of a non-rule standard hard to predict in any given case, but even more than that a non-rule standard fosters uncertainty as to what the standard is. For instance,

even after *Fogerty*, the standard for fee awards in copyright cases seems to vary substantially from Circuit to Circuit.[6] That sort of longstanding disagreement should be avoided where possible.

Third, the things that led this Court to a non-rule standard for the Copyright Act in *Fogerty* are absent here. For one, the relevant legal and historical context is different. The fee provision of the Copyright Act, using the crucial word "may," was enacted in 1909, long before this Court's decisions in *Piggie Park* and subsequent cases had read that word as incorporating rule-based standards. *Fogerty*, 510 U.S. at 523. When the provision was reenacted without change in 1974 (*id.*), there is no reason to infer that Congress was intending to change whatever "may" had meant in the copyright statute from 1909 onward. Here, by contrast, Congress used the word "may" when making fees available for the first time in 1988, knowing that this Court had consistently interpreted that word in other fee-shifting statutes to incorporate rule-based standards. A further distinction between *Fogerty*'s analysis of the Copyright Act and this statute is that the Copyright Act's fee-shifting statute runs both ways, allowing awards in favor of a prevailing party whether it is plaintiff or

[6] *Compare Hogan Systems, Inc. v. Cybresource Int'l, Inc.*, 158 F.3d 319, 325 (5th Cir. 1998) (holding that fees should be "routinely" awarded under Copyright Act, as the "rule rather than the exception") *with Assessment Technologies of WI, LLC v. Wire Data, Inc.*, 361 F.3d 434, 436-37 (7th Cir. 2004) (describing this Court's discussion of *Fogerty* factors as "in need of simplification," and going on to provide such "simplification" by holding that there is a "very strong" presumption in favor of a fee award for a prevailing defendant, but no such presumption for a plaintiff who recovers substantial damages) *and Bridgeport Music, Inc. v. Rhyme Syndicate Music*, 376 F.3d 615, 628 (6th Cir. 2004) (describing that Circuit's caselaw as being "consistent with the view from other circuits that it generally does not promote the purposes of the Copyright Act to award attorney fees to a prevailing defendant when the plaintiff has advanced a reasonable, yet unsuccessful claim.").

defendant. Therefore, if that provision were interpreted as a rule or strong presumption in favor of a fee award, it would in effect be the British Rule; and because the British Rule is such a rare bird in American law, this Court believed that Congress would have been clearer about it if it had meant to adopt that rule. *Id.* at 533-34. Under Section 1447(c), by contrast, the right to a fee award runs only in one direction, in that fees are available only when a case is remanded, and not when a motion to remand is denied. As has been seen above, a rule requiring a fee award for a prevailing plaintiff absent exceptional circumstances is not at all unusual in American law. So, there is no reason to demand some clear statement from Congress in order to arrive at the relatively common *Piggie Park* rule.

Finally, and most importantly, Section 1447(c) differs from the Copyright Act in regard to the central inquiry in interpreting the word "may": the "large objectives" of the law in question. *See Zipes*, 491 U.S. at 759. Here, as has been seen above, there is no public interest in protecting defendants' incentive to aggressively litigate questionable removals; to the contrary, the public interest as well as private equitable considerations weigh against such litigation tactics. The balanced and complex set of public interests on both sides of copyright litigation, where even an unsuccessful litigation stance can sometimes confer some benefit on the public, are absent in the case of incorrect removals. Thus, again, the premises for a *Fogerty*-like non-rule standard are absent here.

E. Under the correct standard, an award of fees is the only proper result in this case.

Under the correct standard, an award of fees is the only proper result in this case. If the existence of an objectively reasonable argument (or even a not-quite-good-enough argument) is ruled out as a basis for the denial of fees, then there is no remaining basis at all for the denial of fees in this case. The District Court suggested none. (Pet. App. 14a-21a). The

Court of Appeals suggested none. (Pet. App. 1a-13a). Even Defendants have suggested none. There was no special circumstance that would make an award of fees unjust. If Defendants complain about some supposed lack of clarity in the Complaint, that would be no justification; plaintiffs have no obligation to conform to some federal pleading requirement when filing a complaint in state court, and no federal obligation to make some specific request for an amount of damages. If Defendants complain that the Martins did not move to remand immediately, or that they once thought the removal to have been arguably proper, that does not make the Martins culpable either; it means at most that there was a reasonable basis for thinking the case removable, but that has already been ruled out as a basis for denying fees. Again, the burden of proving a removal proper, and of removing only when proper, is on the removing party or parties; they cannot excuse their error by pointing out that no one immediately corrected them on it. Because nothing would support the denial of a fee award under the proper standard, this Court should remand with instructions that the Martins should be awarded their fees and expenses.

V. EVEN IF THE COURT ADOPTED A SET OF FACTORS TO BE SOMEHOW WEIGHED, RATHER THAN A RULE, STILL AN AWARD OF FEES WOULD BE APPROPRIATE HERE.

We have shown above that the appropriate standard under Section 1447(c) is the *Piggie Park* rule. But even if the Court favored a non-rule approach, and set out instead a list of factors to be weighed, still a fee award would be the proper outcome in this case.

One factor justifying an award of fees, under any multi-factor analysis, would be a conclusion that there was not even any objectively reasonable basis for the removal. That would surely make an award of fees practically mandatory under

any plausible test. But the reverse is not true; in other words, the existence of a reasonable basis for the removal should not be considered as a factor weighing *against* a fee award, but instead should at most leave this factor in equipoise. We have explained above why the existence of a reasonable basis for the removal is no justification for a denial of fees, and will not repeat it at length here. The same reasons show why the existence of a reasonable argument in favor of removal should not weigh against a fee award at all.

The existence of an improper motivation on the removing defendant's part would, presumably, also justify a fee award. But again the reverse is not true; the absence of improper motivation should not weigh *against* an award but should instead leave this factor in equipoise. There are already other sources of law that allow fee awards based on improper motivation, such as 28 U.S.C. § 1927, Fed. R. Civ. P. 11, and the inherent power to award fees for "bad faith" conduct. The point of a separate fee-shifting statute, in general, is to make fees available even when such factors are absent; otherwise there would be no need for the fee-shifting statute. The absence of an improper motivation simply moves the battleground from those other sources of law, to the statute's specific fee-shifting statute; it does not, beyond that, affirmatively help the defendant win the battle there.

A multi-factor analysis might also take account of the respective resources of the parties. In the great bulk of removed cases in our experience, the plaintiffs are individuals, perhaps seeking class-action status but often not; and the defendants are corporations with significant resources. Such facts would weigh in favor of a fee award, in general and in this case. These facts would, in effect, generate a presumption in favor of a fee award in cases (like this one) where the factors discussed above point in neither direction. If a few cases present the opposite scenario, of a relatively

poor removing defendant sued by a prosperous plaintiff, then perhaps the presumption might not apply.

Finally, a multi-factor analysis might take into account the type of error that the defendant made, in wrongly removing the case. If there are such distinctions to be made, then the error that Respondents made in this case is of the most objectionable sort: the effort to expand the boundaries of federal jurisdiction by creation of a new rule of law.[7] This is, if anything, more destructive of comity between federal and state courts, and more burdensome to overcrowded federal dockets, than a dispute over (say) whether a piece of property in dispute is worth somewhat more or somewhat less than the $75,000 that must be "in controversy" in diversity cases. As we have discussed above, a removal based on a novel and debatable but ultimately incorrect assertion of law is extremely unfortunate, because (a) it takes more work for the District Court to decide the motion to remand and for the parties to argue it; (b) it carries a heightened risk that the case will proceed after much work to a final judgment on the merits, only to have that judgment vacated on appeal for lack of subject-matter jurisdiction; and (c) it interferes with the general public interest in having the laws of jurisdiction be clear and settled. So, the presumption in favor of a fee award should if anything be stronger in cases like this one that involve novel contentions about law.

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[7] To some extent, defendants' removal was based on erroneous assertions as to the amount in controversy in the Martins' individual claims; as the Court of Appeals held in *Martin I*, 251 F.3d at 1291 (JA 59-60), defendants failed to meet their burden of proof in that regard. But more important was defendants' attempt to make new law in the Tenth Circuit regarding the aggregation of claims for punitive damages, and of attorneys' fees. It was this latter aspect of the removal—the attempt to expand the boundaries of federal jurisdiction through a new rule of law—that was the stated basis for the denial of fees, in both the District Court and the Court of Appeals.

For these reasons, even if the Court adopted a multi-factor analysis as the standard under § 1447(c), consideration of a reasonable set of factors would yield a fee award in this case.

CONCLUSION

Petitioners respectfully request that the judgment of the Court of Appeals be reversed, and the case remanded with instructions to award the Martins their fees and expenses. In the alternative, the judgment should be reversed and the case remanded for further proceedings under such standard as the Court adopts.

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